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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 151.

RIBAS Y. HIJO,
Appellant,

vs.

THE UNITED STATES.

BRIEF FOR THE APPELLANT.

Statement.

This is an appeal from an order and decree of the United States District Court for the District of Porto Rico dismissing the action for $10,000, for the use by the United States Government of a vessel belonging to the appellant. The facts are clearly stated in the opinion of the court below:

> "This is an action for ten thousand dollars for the "use of a vessel named 'Paz,' for the storage of coal "for twelve months and two weeks, to wit: from "July 28th, 1898, to August 12th, 1899. The decla- "ration avers that the use was by the quartermaster's "department of the army. The answer admits the "alleged use from July, 1898, to May, 1899, but denies "liability upon the ground that the vessel was enemy's "property and was so seized by the military forces of "the United States.

"From the admissions in the pleadings and the "evidence, these facts appear, to wit:

"That the plaintiff in July, 1898, was either a "Spanish corporation or firm composed of Spanish "subjects, and owned the 'Paz,' which was a mer- "chant vessel, and was in the port of Ponce when that "city was captured by the United States Army and "Navy on July 28th, 1898, and it was then taken for "the use of the Quartermaster's Department. It was "so used until in April, 1899, when the War De- "partment ordered its return to the owner if all "claim for use or damage for detention was "waived. This conditional return was refused by "the captain, who claimed to be a part owner, and "who, with his crew, left the vessel.

"There is also evidence tending to show that some "time after this, and probably in April, 1899, the con- "signees of the vessel were notified that it was at their "disposal, and that the Government authorities were "about to discharge those in care of it, and they "were requested to put some one in charge, but they "declined to do so, and the vessel was abandoned. "In the hurricane of August, 1899, it was wrecked.

"It was never in naval custody, and no steps were "ever taken to condemn it as a prize. It was, how- "ever, when seized, a Spanish vessel; it floated the "Spanish flag; its captain and crew were Spanish "subjects, as was also its owner. It did not come "within any of the declared exemptions from seizure "set forth in the proclamation of the President "of the United States of April 26th, 1898, and a claim "filed in the War Department in February, 1900, by "the plaintiffs for its use and value was rejected." (Rec., pp. 5, 6.)

From these findings of fact the following legal conclusions were reached by the Court below:

"The United States being at war with Spain when "this seizure was made, every individual of the one

" country was in legal hostility to every individual of " the other, and all of the property of the one belligerent " was to be considered as hostile as to the other. The " Congress of the United States had by its act of April " 25th, 1898, declared that war existed from April 21st, " 1898, and when this vessel was seized it was enemy's " property, and as such liable to capture. Property " may be hostile and liable to seizure in war from its " character; it may be contraband, but generally the " character of property follows the character of its " owner. It is hostile if he be hostile.

" It is true this vessel was private property, and not " being used for hostile purposes. It was not a legiti- " mate subject of capture by reason of any peculiarity " of its own, but it was, nevertheless, the property of " an enemy, and as such liable to be seized and used " to carry on the war and meet its expense, just as " troops in the enemy's country may be subsisted by " forced requisitions.

" Halleck's Intern. Law, p. 356.

" The former and stern rule was that anything " might be done by a belligerent to weaken his adver- " sary, and it has been vigorously urged by some dis- " tinguished writers upon the subject that this should " be the rule because such is the object of war; but in " recent years the rule has been so far modified that " generally the property of non-combatants upon land " is not liable to be seized as booty nor is pillage per- " missible; and our own Government has upon sev- " eral occasions tried to embody into the law of nations " the exemption from capture of all private property " upon land, not contraband, and also all merchant " vessels; but this policy has not met with general ac- " ceptance by the civilized nations of the world.

" It may properly be said that as an abstract right, " as the *strictum jus*, private movable property on land " of an enemy is subject to seizure and this was the " former custom; but the modern usage is, with some " exceptions, to exempt it.

"The case in hand, however, is the use of an "enemy's property by the war power for war purposes. "In the language of an eminent publicist it is one of "those 'special cases dictated by the necessary opera- "'tion of war.' (United States *vs.* Alexander, 69 U. S.) "It is like the using temporarily for war purposes build- "ings or lands of the enemy in invaded territory. "There is no constitutional limitation of the war "power; and while international law limits the sub- "jects of capture, yet as to the necessity for it or for the "use of the enemy's property, the war power must, to "some extent, necessarily judge. Individual hardship "may result; it always does from war, but the prov- "ince of the court is not to make but to declare the "law, and the conclusion is that no relief can be "granted." (Rec., pp. 6, 7.)

It was therefore ordered that the action be dismissed at the cost of the plaintiff.

A petition for rehearing was then filed and granted and argued (Rec., p. 7). A motion to reverse the decree and to give judgment to the plaintiffs was overruled (Rec., p. 9), the court rendering the following second opinion:

"A rehearing is asked upon the ground that the "court has found as a matter of fact that the use con- "tinued until in April, 1899, and as the protocol, fol- "lowed by the President's proclamation, was dated "August 12th, 1898, the complainants should recover "on a *quantum meruit* the value of the use of the vessel "between those dates.

"This was a seizure in time of war, and not in time "of peace.

"It was, as has been said, a special case arising from "the necessary operation of war, and the war power of "the Government concluded it was necessary to take "and use the property.

"Even conceding that the seizure did not terminate "all right of the Spanish owner in the property or to

" any use of it, yet the protocol and proclamation did
" not end the war. The protocol worked a mere truce.
" The President had not the power to terminate the
" war by treaty without the advice or consent of the
" Senate of the United States. If a treaty be silent as
" to when it is to become effective, the weight of
" authority is that it does not become so until ratified,
" and this was not done until in April, 1899, and the war
" did not end by treaty until then, and all the use made
" by the Government of the vessel was justified by the
" rules of law and international law without compen-
" sation.

" The motion is overruled and rehearing denied."

The original petition was filed October 6, 1900; it was denied April 8, 1901; the order dismissing the motion to reverse the decree was filed April 27, 1901. This appeal was taken on May 25, 1901.

Specification of Errors.

The complainants allege as errors in the court below (Rec., pp. 11, 12):

" SEVENTH.

" In holding and deciding that the necessity of war
" held by international law as justifying the seizure
" and occupation of the enemy's property, includes not
" only such necessities which are immediately con-
" cerning the movements of an army or operations in a
" battle or siege, but all kinds of use of private property
" by the war power at any time and on any occasion
" during the war.

" FOURTH.

" In holding and deciding that the necessities of
" war were continuing after the 12th day of August,
" 1898, at which date the protocol of peace was signed
" by the representatives of the United States and Spain
" and the President of the United States issued a proc-
" lamation ordering that all hostilities cease, by which

" protocol and proclamation the actual war, so far as the
" necessities of war were concerned, was then thereby
" ended."

Jurisdiction.

The amount in controversy is $10,000 (Rec. p. 2, fol. 3). In Royal Insurance Company *vs.* Martin, No. 86, October Term, 1903, decided January 11, 1904, this Court held that under Section 35 of the Act of April 12, 1900, c. 191, 31 Stat. at L. 85, entitled "An act Temporarily to Provide Revenues and Civil Government for Porto Rico and for other purposes," and Section 702 of the Revised Statutes of the United States and under the Act of March 3, 1885, c. 355, 23 Stat. at L., 443, this Court will take jurisdiction in any case coming from Porto Rico involving $5,000, exclusive of costs.

The Act of March 3, 1887, Ch. 354, 24 Stat., 505, after providing in section 2 that the circuit court shall have concurrent jurisdiction with the Court of Claims in all suits against the United States for a sum exceeding $3,000, and not exceeding $10,000, provides in Section 9:

" That the plaintiff or the United States, in any suit
" brought under the provisions of this act, shall have
" the same rights of appeal or writ of error as are now
" reserved in the statutes of the United States in that
" behalf made, and upon the conditions and limitations
" therein contained."

R. S., Sec. 707, provides as follows:

" An appeal to the Supreme Court shall be allowed
" on behalf of the United States, from all judgments of
" of the Court of Claims adverse to the United States,
" and on behalf of the plaintiff in any case where the
" amount in controversy exceeds three thousand dol-
" lars or where the claim is forfeited to the United
" States by judgment of said court as provided in section
" one thousand and eighty-nine."

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Points.

1. IT IS AN UNDISPUTED RULE OF MODERN INTERNATIONAL LAW, EUROPEAN AND AMERICAN ALIKE, THAT THE PRIVATE PROPERTY OF THE CITIZENS OF AN INVADED TERRITORY OF THE ENEMY CAN NOT BE TAKEN WITHOUT COMPENSATION.

The object of war in modern times is no more, as it used to be in antiquity, pillage and plunder. No civilized power on earth now undertakes a war in order to plunder the property of citizens of another country. There is no court in the civilized world which would maintain such a purpose as lawful and permitted by the principles of international law. The practice of all civilized nations in all modern war has been to respect rights of private property of individual subjects and even of private property of the sovereign of an enemy country as that of an individual.

The object of war in modern times between civilized peoples, between whom alone international law can be said to prevail, is to decide some disputed question between two nations, which can not be decided otherwise than by a trial of force. Its only aim is through the application of superior force to bring the other side to submission as soon as possible. No damage to the interests of the individuals as citizens of an enemy country is intended. On the contrary, it has become the practice, as soon as a territory is invaded, for the army to assume the protection of the personal and property rights of the individual citizens of the invaded enemy territory. It is absurd to assume that the armies of invasion, who by the instructions and orders of the chiefs of their nation are intrusted with the responsibility of protection of property and personal rights, shall in the invaded territories themselves be allowed to infringe and violate those sacred rights. It would also be absurd to admit

for a moment that of all civilized nations the great Republic of the United States, founded upon principles of justice and uprightness, is the one which will not accept these humane rules of conduct of war and will permit plunder and pillage, this being the only name that can in our times be given to such acts as depriving a private citizen of his property without compensation simply because we are at war with the sovereign of his country.

Fortunately for the honor of humanity and of our country, the practice of this Government, as well as the instructions and military orders given by it, flatly contradict such a false assumption.

That the practice as stated has been absolutely accepted by all civilized nations will be shown by a few very short quotations from writers of authority on the Law of Nations in different countries and tongues.

Halleck "*International Law*," Vol. II, Ch. XXI, S. 12:

"Private property on land is now, as a general rule
"of war, exempt from seizure or confiscation; and this
"general exemption extends even to cases of abso-
"lute and unqualified conquest. Even where the con-
"quest of a country is confirmed by the unconditional
"relinquishment of sovereignty by the former owner,
"there can be no general or partial transmutation of
"private property, in virtue of any right of conquest.
"That which belonged to the Government of the van-
"quished passes to the victorious State, which also
"takes the place of the former sovereign, in respect to
"the right of eminent domain; but private rights,
"and private property, both movable and immovable,
"are in general unaffected by the operation of war,
"whether such operations be limited to mere military
"occupation, or extend to complete conquest. Some
"modern text writers—Hautefeuille, for example—
"contend for the ancient rule that private property
"on land is subject to seizure and confiscation. They
"are undoubtedly correct with respect to the general

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"*abstract right*, as deduced from the law of nature and "ancient practice; but while the general right con- "tinues, modern usage, and the opinions of modern "text writers of the highest authority, have limited "this right by establishing the rule of general exemp- "tion."

Says the great German jurist, Bluntschli, in the introduction to his "*Codified International Law*":

"On what principle can the pretended right (of tak- "ing by force private property of the enemy) be based? "On the absurd idea of antiquity that the enemy is a "being without rights? But the enemy is a human "being, and every human being has rights; or on the "idea that in war it is force only that regulates all? But "it is precisely the task of international law to re- "strain as much as possible the dominion of brutal "force. Or may be upon the idea that to injure your "enemy is a natural right in time of war? But particu- "lar individuals in their quality of particular individ- "uals are not enemies, and therefore private property "cannot be properly attacked. Or finally, upon the "accord of all the peoples? But the civilized peoples "have recognized that plunder of private property in "war is no other thing than robbery by force."

Our own Theodore D. Woolsey says in his *Introduction to to the Study of International Law* (Section 130):

"The property, movable as well as immovable, of "private persons in an invaded country is to remain "uninjured. But if the wants of the hostile army may "require, it may be taken by authorized persons *at a* "*fair value.*"

We quote from "*International Law*" by Freeman Snow, prepared and published by order of the United States Navy Department, and based upon lectures delivered at the United States Naval War College (Section 51):

"It is also to be noted that the right under military "government to appropriate the private property of "enemies for any purpose is to be regarded as materi- "ally modified where upon a permanent or continued "occupation an increased measure of protection to per- "sons and property has been guaranteed. So where a "commander in occupying a country or town of the "enemy has formally pledged the government to the "holding inviolate of the rights of property of individ- "uals, the seizure of private property by the military "authorities will not be recognized as legal."

In *Mrs. Alexander's Cotton*, 2 Wall., 404, this Court decided as follows:

"Being enemies' property, the cotton was liable to "capture and confiscation by the adverse party. *Prize* "*Cases*, 2 Black., 687. It is true that this rule as to "property on land has received very important quali- "fications from usage; from the reasonings of en- "lightened publicists; and from judicial decisions. It "may now be regarded as substantially restricted 'To "'special cases dictated by the necessary operation of "'war,' 1 Kent, 92, and as excluding, in general,' The "'seizure of the private property of pacific persons for "'the sake of gain,' 1 Kent, 93. The commanding gen- "eral may determine in what special cases its more "stringent application is required by military emer- "gencies, which considerations of public policy and "positive provisions of law, and the general spirit of "legislation, must indicate the cases in which its ap- "plication may be properly denied to the property of "non-contraband enemies."

A perusal of the decision shows that the seizure of cotton was justified on the ground that the mainstay of the Confederate States lay in their supply of cotton which was shipped abroad and there exchanged for munitions of war and other necessary supplies. It can hardly be said that the vessel "Paz" either by itself or as a part of the

merchant marine of Porto Rico was so essential to the Spanish Government in the prosecution of the war as to justify the United States Government in seizing it.

Finally in Lieber's "*Instructions for the Government of Armies of the United States in the Field*," known also as General Orders, No. 100, it is prescribed that private property of the enemy be respected and not taken without compensation, and that in case the owner be not absent the commanding officer shall give him a receipt in order that he may be thereafter indemnified:

> "SECTION 38. Private property, unless forfeited by "crimes or by offenses of the owner, can be seized only by "the way of military necessity, for the support or other "benefit of the army of the United States.
>
> "If the owner has not fled, the commanding officer "will cause receipts to be given, which may serve the "spoliated owner to obtain indemnity."

For the authority of General Orders, 100, above referred to, see Lawrence's International Law, Sec. 66; Dana's Wheaton's International Law, Sec. 16. The full text of the Order is to be found in the appendix to Glenn's *International Law*.

The same instructions are contained in General Orders, 101, July 13, 1898, signed by President McKinley:

> "Private property, whether belonging to individuals "or corporations, is to be respected, and can be confis- "cated only for cause. Means of transportation, such "as telegraph lines and cables, railways and boats, may, "although they belong to private individuals or corpo- "rations, be seized by the military occupant, but unless "destroyed under military necessity *are not to be retained.*
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> "Private property taken for the use of the Army is "to be paid for when possible in cash at a fair valua- "tion, and when payment in cash is not possible, re- "ceipts are to be given."

In view of definite instructions to the United States armies not to seize private property without compensation there can be no doubt that in the seizure and use of the "Paz" there was implied a contract in fact that the United States would pay a just compensation for the use of the vessel.

For other authorities on this subject see the following:

Lawrence's Wheaton, *Elements of International Law*, Part 4, Ch. 2, Sec. 7.

Taylor's *International Law*, Secs. 536, 538.

Fiore, *Public International Law*, Sec. 1506 (Italian).

Frederic II. *Oeuvres*, Vol. 28, p. 91.

Bluntshli, *Moderne Kriege* (German) Sec. 152–157.

Bluntshli: *Codified International Law* (German, but translated into all languages and universally adopted), Sec. 655.

2. The Only Exception to the Foregoing Rule is That an Army During a War May Take or Destroy Property of Private Citizens in Case of Immediate Necessity for or on the Field of Battle, Encampment or Marches or for Battle or Siege.

The reason for such exception is that in these excepted cases the necessity is so strong and great, that it would defeat the whole object of war to refrain from infringing upon property rights of individuals. This exception is therefore very strictly taken and extends only to those cases in which a rigorous adherence to the law forbidding the infringement of private rights of property would be antagonistic to the conduct of war, and would impede its operations. But it can never be applied to any other class of cases, where the enforcement of the law respecting private property rights would not impair or impede the conduct of the war.

The above cited authorities all agree as to the extent of this exception.

The present case, however, does not fall within this exception, as no immediate necessity has been shown by the Government to have existed for the seizure of the vessel.

3. A Protocol Containing the Preliminaries of Peace and a Stipulation of Cessation of Hostilities Puts an End to the Right of Confiscation Even for So-called Necessities of War.

Confiscation is permissible only when the necessities of war make it urgent and impossible of avoidance in order that the conduct of battles and sieges may not be interferred with. When both parties agree to cease hostilities this reason for confiscation is gone. There can be no more excuse for a confiscation. Any confiscation of private property made after the preliminaries of peace have been established and cessation of hostilities agreed upon savors of robbery, which cannot find any excuse in a plea that the necessities of war or equally urgent considerations demand it.

Says Bluntshli, *International Law Codified*, Sec. 705:

> "The preliminaries of peace which serve as a basis
> "for a definitive peace and determine the essential stip-
> "ulations thereof, rest upon the same conditions and
> "in the limits to which they refer have the same ef-
> "fect as treaties of peace by which they are replaced."

Now as far as cessation of hostilities is concerned, and therefore the cessation of all necessities of war properly so called, the protocol of peace signed on the 12th day of August, 1898, and followed by the proclamation of the President of the United States ordering cessation of all hostilities, has certainly had the effect of rendering all necessities of war postponed, if not stopped forever, and therefore no con-

fiscation can be excused on account of necessities of war after and from that date.

Says Woolsey, *Introduction to Study of International Law*, Sec. 150:

> "The conclusion of a peace being one of the most "important acts of sovereignty, it is naturally carried "on with all the formalities with which the most solemn "treaties of other kinds are adjusted. Sometimes the "general basis on which the two parties will consent to "be at peace is laid down long before the details are "arranged. The first agreements are called prelimi-"naries, and a peace at this stage is a preliminary "peace in contrast with a definitive peace. The pre-"liminary peace is binding from the time it is signed."

One of the ways recognized by international law of putting an end to war is the cessation of hostilities and subsequent re-establishment of peaceful relations between the belligerents. Now if this is and always has been the recognized theory, how could it be for a moment maintained that a simultaneous solemn and public proclamation of cessation of hostilities and acceptance of a basis of a treaty of peace will not have the same effect? It is quite clear that as far as this point is concerned the protocol and proclamation of the President of the United States had the same effect as a definitive treaty of peace. The "necessities of war" disappeared with the virtual cessation of the war.

It is submitted, therefore, that, even if the seizure of the vessel was justified, the use of the same after the signing of the preliminaries of peace, and the proclamation by the President of a suspension of hostilities (August 12, 1898, 30 Stat., 1780), was not justified under the plea of temporary or military necessity. While the President may not declare war, or make a definitive treaty of peace, he does possess, as commander-in-chief of the Army and Navy, the power to end the war.

It is within the judicial knowledge of the Court that General Miles, on entering Porto Rico, issued a proclamation assuring the population that the Government of the United States guaranteed to all inhabitants full protection of their persons and property.

Conclusion.

It is respectfully submitted in conclusion that the implied contract for the payment for the use of the vessel cannot be avoided by pleading that the seizure of the vessel was for temporary and military uses; at any rate, not after the date of the protocol.

The order and decree of the court below should be reversed and a new trial granted.

Respectfully submitted,

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Attorney for Appellant.